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No. 88-1019

In the Supreme Court of the United States

OCTOBER TERM, 1988

HERBERT D. BERKSON,
PETITIONER,

v.

DEL MONTE CORPORATION, *et al.*,
RESPONDENTS.

BRIEF OF RESPONDENT COVINGTON & BURLING IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court consider a claim that respondents have violated the Anti-Deficiency Act, where (a) no such claim was pleaded in the complaint or presented to either of the lower courts; and (b) there is no basis on which to hold that the statute provides for a private right of action or for an action against private parties?

2. Should this Court review the purely factual determination of when the statute of limitations began to run on petitioner's claims, a determination that has twice been made and resolved against petitioner by the lower courts?

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Counterstatement of the Case

This case represents petitioner's third effort to recover on claims that are now nearly twenty years old. It is petitioner's second effort to secure review of those claims by this Court. We briefly set forth here the pertinent facts and holdings of the lower courts.[1]

[1] For the Court's convenience, an appendix has been included consisting of (i) the Report and Recommendation filed by Magistrate Cohen on April 23, 1987, and subsequently adopted by the district court, (ii) the district court's May 29, 1987, judgment, (iii) the June 29, 1988, unpublished opinion of the First Circuit affirming the district court judgment, and (iv) the opinion of the First Circuit in petitioner's prior antitrust suit, which is published at 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985). Citiitions to this appendix are in the form ("App. __.").

In 1958, United Fruit, the predecessor of respondent United Brands, settled an antitrust action brought by the Department of Justice. The parties consented to the entry of a decree that, *inter alia*, required United Fruit to divest itself of certain banana-growing properties in Central America. *United States* v. *United Fruit Company.*, C.A. 4560 (E.D. La. 1958). Covington & Burling represented United Fruit, and then United Brands, in that proceeding. That representation is this respondent's sole involvement in the events that underlie a series of law suits subsequently brought by petitioner.

United Fruit initially planned to comply with the decree by selling certain properties in Panama, and in 1967, its plan to do so was approved by both the Justice Department and by the Honorable Seybourn Lynne, the federal judge supervising the decree. Ultimately, the Panamanian government refused to permit the sale to go forward, and the plan was abandoned in 1970. Instead, it was determined that United Brands should divest itself of certain banana-growing properties in Guatemala.

On November 29, 1972, Judge Lynne approved United Brands' proposal to sell the Guatemalan properties to Del Monte. Petitioner, in association with a Guatemalan national, was interested in purchasing those properties. Before approving the sale, Judge Lynne received petitioner's brief (and supporting materials) in opposition to the sale and permitted petitioner to address the court at length with respect to his objections. The court-approved sale has been the target of all the litigation subsequently initiated by petitioner.

Petitioner's first collateral attack on the divestiture sale was commenced in 1974, when he sued United Brands and its then-Chairman, Eli M. Black, for alleged breach of an oral agreement to sell the Guatemalan properties to petitioner and his group. That action was dismissed by the Massachusetts trial court in 1978, and petitioner's appeal was dismissed by the state appellate court in June, 1979. *Berkson* v. *United Brands Co., et al.*, Civil Action No. 2824 (Mass. Super. Ct. 1978), *appeal dismissed*, No. 79-153 (Mass. App. 1979).

In June, 1979, following the dismissal of his state case, petitioner turned to the federal courts in his next effort to undo the court-approved sale. Petitioner brought suit against United Brands and Del Monte for alleged violations of the federal antitrust laws. As part of that suit, petitioner alleged that United Brands and Del Monte had made bribes and other "questionable payments" to Guatemalan officials in order to gain approval of the sale. Petitioner similarly accused the two companies of having lied to Judge Lynne in 1972 to conceal the alleged bribery. As petitioner acknowledges, his knowledge of these alleged "questionable payments" dates from at least July 14, 1975—the date of an article in the *Wall Street Journal* disclosing certain payments by Del Monte to a consultant in Guatemala. (Pet. 3.)

After extensive discovery, the district court entered judgment against petitioner on the independent grounds that his antitrust claims were barred by the statute of limitations, the Act of State doctrine, the failure to prove injury to "business or property" as required by Section 4 of the Clayton Act,[2] and because the suit was an impermissible collateral attack on the 1958 consent decree and the related proceedings before Judge Lynne. Petitioner appealed the judgment to the Court of Appeals for the First Circuit, which affirmed. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

That court held that petitioner's antitrust complaint was "based entirely on actions occurring before the consummation of the 1972 sale; no subsequent overt act in furtherance of the alleged conspiracy is described or even hinted at. It is clear, therefore, that Berkson's cause of action accrued no later than December, 1972. . . ." (743 F.2d at 55; App. A-21-22.) The court therefore concluded that the action was untimely "[o]n its face." (*Id.*; App. A-22.)

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[2] The district court's holding in this respect was based on overwhelming evidence developed in the course of the prior litigation that petitioner was wholly unable successfully to operate a banana plantation.

The court then reviewed petitioner's allegations of fraudulent concealment and found that there was "no trace of any allegation, let alone a showing sufficient to raise a genuine issue of fact," on critical elements of that charge. (743 F.2d at 55-56; App. A-23.) It expressly found that petitioner "voiced his suspicions and filed an *amicus curiae* brief before the United States District Court for the Eastern District of Louisiana in 1972, when he opposed the sale to Del Monte on grounds *virtually identical* to those advanced in the present case." (*Id.* at 56; App. A-24) (emphasis supplied). The court found "absolutely no indication" that petitioner had made any " 'conscientious effort' to substantiate the suspicions he voiced to the district court in Louisiana in 1972." (*Id.*; App. A-25.) It therefore affirmed the judgment of the district court. Petitioner then sought review in this Court, which was denied. 470 U.S. 1056 (1985).

Petitioner commenced the instant action, his third collateral attack on the court-approved sale, in late September, 1986. Although allegations of fraud and corruption permeated petitioner's earlier actions as well as his argument before Judge Lynne, and although petitioner was obviously aware of the firm's role in the divestiture proceeding, he raised no claim against Covington & Burling until he filed the current action. Unlike the prior federal action, petitioner's current suit focuses on alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1986). The complaint affirmatively acknowledges that the facts underlying the current action are the same as those underlying the earlier antitrust suit. (*See, e.g.*, Complaint ¶¶ 1, 16.) It mentions Covington & Burling in only four of its 61 paragraphs, and the most specific fact that is pleaded concerning this respondent is its address.[3]

[3] In addition to Covington & Burling, petitioner sued Del Monte, United Brands, three other law firms (Goodwin, Procter & Hoar, Palmer & Dodge, and Pillsbury, Madison & Sutro), an accounting firm (Price Waterhouse), and three former government officials (Nathaniel Davis, Henry A. Kissinger, and William Rogers).

All defendants moved for judgment shortly after the filing of the complaint. The district court referred the motions to a Magistrate, who recommended on April 23, 1987, that each defendant's motion be granted. The district court thereupon granted summary judgment for all defendants on May 29, 1987, based on the report and recommendation of the Magistrate. With respect to the claims relating to the court-approved sale, the court held that petitioner's claims against respondents United Brands and Del Monte, who were parties to the prior antitrust action, were "barred by the doctrine of *res judicata*, or claim preclusion. That conclusion is inescapable in the circumstances." (Magistrate's Report at 6; App. A-5.)

The remaining respondents, including Covington & Burling, were entitled to "assert the benefits of collateral estoppel, or issue preclusion, on at least those claims of plaintiff involving the 1972 divestiture." (Magistrate's Report at 11; App. A-9.) The court had "no doubt" that petitioner "had a full and fair opportunity to litigate" the statute of limitations issue (including any claim of fraudulent concealment) in his earlier antitrust action. (Magistrate's Report at 11; App. A-10.) Moreover, "the factual determinations regarding the bar of the statute of limitations were necessary to the judgment of the Court of Appeals in the prior suit. . . ." (Magistrate's Report at 11; App. A-10.)

The court considered whether petitioner's current case was based on the same facts as his earlier antitrust action. It found that there was "no doubt that the underlying facts of the RICO claim are precisely the same as the facts underlying the antitrust claim." (Magistrate's Report at 8; App. A-7.) The court was "unable to find any factual allegations indicating that plaintiff's current action grows out of a different transaction than that alleged in his first suit." (*Id.*; App. A-7.) Thus, petitioner's change in legal theory was entitled to no weight.

> "[T]he change in legal theory cannot disguise the fact that plaintiff's two causes of action are grounded on the same transaction—the 1972 divestiture. Plaintiff alleges no new facts regarding the events surrounding the sale of United Brands' Guatemalan banana properties. Thus, the issue of when the antitrust claim arose is identical to the issue of when the RICO claim arose. Both arose by December, 1972.
>
> * * *
>
> "That plaintiff's RICO claim is time-barred is obvious." (Magistrate's Report at 11-12; App. A-10.)

Based on these factual findings, as well as the First Circuit's earlier opinion, the district court concluded that petitioner's RICO claims, like his earlier antitrust claims, were untimely and that principles of collateral estoppel barred relitigation of that issue. (*Id.* at 13-14; App. A-11-12.)[4]

The district court's judgment was affirmed in a *per curiam* opinion of the Court of Appeals for the First Circuit, "substantially for the reasons stated in the magistrate's report and recommendation adopted by the district court." (First Circuit opinion at 3; App. A-17.) The Court of Appeals specifically considered this Court's intervening opinion in *Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143, 107 S. Ct. 2759, 2767 (1987), that the four-year statute of limitations governing actions under the Clayton Act was the applicable limitations period for civil RICO actions and concluded that "this adjustment does not affect plaintiff's claims based on the 1972 divestitute. Those claims remain long time-barred under the new standard." (*Id.* at 4; App. A-18.)

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[4] The district court's judgment separately considered petitioner's claims based on the 1972 court-approved sale and those based on alleged misconduct by the defendants in the prior antitrust litigation. The court found that Covington & Burling had no involvement whatsoever in the alleged misconduct in petitioner's earlier antitrust case, and the complaint alleges no touch by Covington & Burling with the subject matter of this action following the conclusion of the divestiture proceeding on November 29, 1972. (Magistrate's Report at 13-14 and n.7; App. A-11-12).

The Court of Appeals pointed to petitioner's admitted awareness of the alleged bribery of Guatemalan officials since "the 'bribe' was reported in a 1975 article in the *Wall Street Journal.*" (First Circuit opinion at 6; App. A-19.) And the court also addressed certain other facts in the record establishing that petitioner's "claims under RICO accrued before September 25, 1982 and are therefore time-barred even under *Agency Holding Corp., supra,* 107 S. Ct. 2759." (*Id.* at 5; App. A-18.) Petitioner's motion for rehearing was denied in an order dated September 15, 1988. (Pet. 1j.)

In this Court, petitioner challenges the holdings below that his action was untimely. But petitioner has nowhere shown that any respondent committed any act within the four year limitations period that could form a basis of civil RICO liability. Petitioner submitted voluminous briefs and appendices to both the district court and the Court of Appeals but was unable to identify any conduct within four years of the filing of his complaint. Nor is any such conduct identified in the petition for writ of certiorari. And petitioner has similarly failed to identify any conduct by Covington & Burling subsequent to the 1972 court-approved divestiture sale.[5]

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[5] Petitioner continues to assert that the "law firms representing said Del Monte and United Fruit, in some instances submitted perjured affidavits...." (Pet. 16.) As the Court of Appeals recognized, the only "documentation" for this charge (which has never been made against this respondent) is simply petitioner's allegations. (First Circuit opinion at 4-5; App. A-18.)

Petitioner also claims that Covington & Burling has admitted to acting in league with government officials in a manner that "is in stark violation of the 'Anti-Deficiency Act' (U.S. Code 1982, Title 31)...." (Pet. 17-18.) This claim is based on a continued misreading and misstatement of the twelfth defense of Covington & Burling's answer to the complaint. That defense states:

> "If this defendant committed acts alleged in the Complaint, *which it denies*, it is immune from suit *to the extent* that it took action in concert with officials of the United States Government who were acting pursuant to their official duties." (emphasis supplied)

As the answer makes clear, Covington & Burling denied each and every allegation of wrongdoing on its part made by petitioner. The defense of immunity was asserted strictly in the alternative and played no role whatsoever in either of the decisions below.

Reasons for Denying the Writ

Petitioner has offered no reason, let alone any "special and important" reason, why this case warrants review by this Court. (Rule 17.1.) The petition does not frame an issue of constitutional or statutory significance and concentrates on an issue not raised below.

The Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.* (1986), which petitioner invokes for the first time in this long-continuing litigation, is wholly irrelevant. It is a criminal statute that applies by its terms only to government employees and creates no private right of action. Dismissal of petitioner's action on the ground that it is time-barred is amply supported by findings of fact made by the lower courts which this Court does not sit to review.

I. The Contention That the Anti-Deficiency Act Was Violated Does Not Warrant Consideration.

The Anti-Deficiency Act, 31 U.S.C. § 1341 (1986), states in relevant part that

> "(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."[6]

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[6] Section 1342 states that these same employees "may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

Any such employee who "knowingly and willfully" violates either section 1341(a) or section 1342 "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. § 1350 (1986).

Petitioner advances for the first time in this Court a claim that this statute has been violated. Because this claim was not presented below, it should not be considered by this Court. Moreover, there is no basis whatsoever for a holding that the Anti-Deficiency Act provides for a private right of action or for an action against private parties. Absent such a right, petitioner's claim cannot be sustained.

A. *No Such Claim Was Presented in the Lower Courts.*

Petitioner's complaint described the nature of his action as follows:

> "This is an action to recover damages for securities fraud, civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), common law fraud, intentional interference with business and contractural (sic) relations, breach of fiduciary duty, misuse and improper disclosure of confidential business and proprietary information belonging to plaintiff in connection with the purchase of the divestiture properties of the United Fruit Company, now United Brands ("United"), in Guatemala, Central America." (Complaint ¶1.)

Nowhere did petitioner's complaint plead a claim under the "Anti-Deficiency Act."

Throughout this litigation, plaintiff has pursued his claim as one under the RICO statute. Thus, the district court understood that petitioner raised claims "primarily based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*. . . ." (Magistrate's Report at 1; App. A-1.) At no time did petitioner brief or even mention in the district court what is now the primary issue

submitted for consideration by this Court—an asserted violation of the Anti-Deficiency Act. Nor did the district court consider such a claim.

Similarly, petitioner ignored the Anti-Deficiency Act in the Court of Appeals. Thus, in his brief to the First Circuit, petitioner argued that his current action was "in nexus" with his earlier antitrust case. (Br. 2.) That same brief (at pp. 7-9) identified a series of 13 criminal statutes that petitioner contended had been violated by the respondents, including, *inter alia*, 18 U.S.C. § 371 (Conspiracy to Defraud the United States), 18 U.S.C. § 1005 (Banking Fraud), and 18 U.S.C. §§ 1341, 1343 (Mail and Wire Fraud). Nowhere in his briefs to the Court of Appeals did petitioner contend that there was any violation of the Anti-Deficiency Act and the Court of Appeals, like the district court before it, never considered that question.

Under these circumstances—where the question has never been pleaded, briefed, or argued to the lower courts—this Court will not agree to consider it for the first time. *See, e.g., Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984) (where "petitioner did not present this argument to the Court of Appeals, we decline to consider it."). The Court has consistently declined to consider questions not properly presented in the pleadings. *See, e.g., Virginian Railway Co.* v. *Mullens*, 271 U.S. 220, 227-228 (1926), where the Court refused to consider plaintiff's eleventh-hour effort to base liability on a new legal theory. "The case stated in the complaint was distinctly in tort. There was no mention of a contract obligation. . . . After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below." That is, of course, precisely what petitioner seeks to do in this case. *See also McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241, 249-50 (1949).

The Court has long refused to consider issues raised for the first time in a petition for certiorari. *See, e.g., United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700 (1929); *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U.S. 458, 465 (1925) ("This court is a court of review, and it will not consider questions not raised or disclosed by the record brought to it for a review and which were not considered by the courts below.").

The Court's reasoning in *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977), where it declined to consider plaintiffs' last-minute attempt to assert a private claim based on alleged violations of the Airport and Airway Development Act of 1970, is particularly applicable here. The Court noted that the complaints in *Miree* "sought recovery solely on the grounds of negligence, nuisance, and breach of contract. There is no indication that petitioners alleged a violation of a federal statute and a right to recovery for such a violation. The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the district court or in the Court of Appeals, we will not consider it."

B. *There Is No Basis for Implying a Private Right of Action Under the Anti-Deficiency Act.*

Had the courts below considered petitioner's claim under the Anti-Deficiency Act, they would have been required to decide whether that Act applies to private parties or provides for a private right of action in the circumstances presented here. By its terms, the Act applies only to officers and employees of the United States and District of Columbia governments. 31 U.S.C. § 1341 (1986). It is a criminal statute, and provides that violations are punishable by fines of up to $5,000, imprisonment of up to two years, or both. 31 U.S.C. § 1350 (1986). Nothing in the statute expressly provides for a

private right of action, and petitioner would therefore be required to establish that such a right could be implied under this Court's decisions. There are no decisions that support such an implication.

This Court has set forth on several occasions the tests that are to be applied in determining whether a federal statute implies a private civil right of action. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-95 (1982) (private right of action exists under Commodity Exchange Act); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 23-24 (1979) (limited private right of action under Investment Advisers Act of 1940); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-76 (1979) (no private right of action under Section 17(a) of Securities Exchange Act of 1934); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688-717 (1979) (private right of action exists under Title IX of Education Amendments of 1972); *Cort* v. *Ash*, 422 U.S. 66, 78-85 (1975) (no private right of action to enforce limitation on corporate campaign contributions.)

The Court has emphasized in these cases that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon*, 441 U.S. at 688. In *Cort* v. *Ash*, 422 U.S. at 78, the Court set forth four factors to be considered in deciding whether to imply a private right of action.

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,'. . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?. . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?. . . And finally, is the cause of action one traditionally relegated to state law, in an area basically

> the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" (citations omitted) (emphasis in original).

Since then, the Court has refined its analysis to focus primarily on the first three factors, recognizing that "(t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross*, 442 U.S. at 575.

Simply put, petitioner has made no showing—nor could one be made on this record—that he is entitled to bring a private civil action to enforce the Anti-Deficiency Act, even assuming that violations of that Act took place.[7] As in *Cort* v. *Ash*, this case at most presents "nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone." 422 U.S. at 79-80. There is no indication that the statute was intended to benefit petitioner or that Congress intended civil suits to supplement the criminal enforcement procedures that it established. As the Court observed in *Touche Ross*, "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." 442 U.S. at 572. Congress has plainly not done so, and this Court should not reach to decide that question in this case.

II. The Court Should Not Engage in Further Fact Finding Concerning the Timeliness of Petitioner's Claims.

Inasmuch as the decision below in favor of Covington & Burling independently rested on settled principles of collateral estoppel, which are not challenged by petitioner, the issue of when petitioner's claim accrued for statute of limitations pur-

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[7] It is not without significance that Congress amended the Anti-Deficiency Act in 1982 without providing for such a private right of action, even though it may be presumed that Congress was well aware of this Court's holdings on the implication of rights of action. *See* Pub. L. 97-258, 96 Stat. 923.

poses is irrelevant. In any event, the question of accrual is a purely factual one on which both the district court and the Court of Appeals have twice ruled. In both cases, the lower courts were unanimous in finding that petitioner's claims are untimely. This Court has already denied review on the application of the four year statute of limitations to petitioner's antitrust claims. 470 U.S. 1056 (1985).

Based on this Court's holding in *Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143 (1987), the identical four-year statute of limitations applies to both antitrust and RICO actions. This case therefore does not present the issue of *what* statute of limitations is appropriate in the context of civil RICO. Rather, it presents the purely factual question of when petitioner's RICO claims accrued so as to start the statute of limitations running. Petitioner contends, without support, that so long as the effects of the alleged RICO violation continue, his time in which to bring suit is tolled indefinitely. (*See, e.g.*, Pet. at 26-27.)

In the prior antitrust action, the First Circuit found that petitioner had failed to identify any overt act subsequent to the 1972 court-approved sale. (743 F.2d at 55; App. A-21-22.) Petitioner still has not identified a single act by any respondent that occurred within four years of the filing of the complaint. Petitioner continues to assert that his action was concealed from him notwithstanding the First Circuit's findings to the contrary. (743 F.2d at 56; App. A-23-25.) And given the intensity with which petitioner has litigated for more than 15 years, his claims of concealment are simply not credible.

The Court of Appeals carefully considered petitioner's extensive submissions and focused in particular on those allegations that were more recent in time. It found, after a full review of the record, that petitioner was well aware of his alleged cause of action long before September, 1982.

"The allegedly false affidavit of Laurence Johnson submitted by Palmer and Dodge on Del Monte's behalf was filed on or about August 1, 1979, and the allegedly false interrogatories filed by Palmer and Dodge on Del Monte's behalf were filed on June 18, 1981. Furthermore, plaintiff asserts in his brief on appeal that by November 25, 1981 he noticed that the district judge in the prior federal action had turned against him as part of a conspiracy involving Palmer and Dodge, Goodwin, Procter, and Hoar and their clients. Accordingly, we hold that plaintiff's claims under RICO accrued before September 25, 1982 and are therefore time-barred even under *Agency Holding Corp., supra*, 107 S. Ct. 2759." (First Circuit opinion at 4-5; App. A-18.) (citations omitted).

The determination of when this petitioner's action accrued is strictly a factual one without precedential significance. It presents no issue worthy of review by this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 6, 1989

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 86-2775-N

HERBERT D. BERKSON,

PLAINTIFF,

v.

DEL MONTE CORPORATION, ET AL.,

DEFENDANTS.

REPORT AND RECOMMENDATION ON DEFENDANTS MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, MOTIONS FOR SUMMARY JUDGMENT

April 23, 1987

COHEN, M.

Plaintiff, Herbert D. Berkson, commenced this action on September 25, 1986. This represents his second trip to this court, and third trip to federal courts, complaining about matters attendant to the divestiture of the United Fruit Company. Although primarily based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.*, plaintiff's complaint includes claims for common law fraud, intentional interference with contractual and business relations, breach of fiduciary duty, and disclosure of "confidential business and proprietary information belonging to plaintiff in connection with the purchase of the divestiture properties of the United Fruit Company, now United Brands. . . in Guatemala, Central America." Plaintiff's Complaint §1. Also mentioned in the body of the complaint are claims for violations of the Sherman and Clayton Acts, the

Securities Exchange Act of 1934, 15 U.S.C. §78n(e), and various criminal statutes not part of RICO.[1]

Plaintiff has named as defendants Del Monte Corp., United Brands Co., Price Waterhouse, Palmer & Dodge, Goodwin, Procter & Hoar, Pillsbury, Madison & Sutro, Covington & Burling, William P. Rogers, Henry A. Kissinger and Nathaniel Davis.

All defendants have moved to dismiss plaintiff's complaint, or in the alternative for summary judgment, based on res judicata, collateral estoppel, statute of limitations, failure to state a claim upon which relief can be granted and immunity.

I. *BACKGROUND*

In 1954, the United States commenced an action in Louisiana federal court against United Fruits (the predecessor of United Brands) for violations of the Sherman Act. In 1958, a consent decree was entered into by the parties. Article VIII of the decree required United Brands to divest itself of part of its banana producing properties.

In 1970, properties in Guatemala were approved for sale by the Louisiana court and United Brands entered into negotiations with Del Monte for the purchase of the properties. However, in 1971, the Guatemalan government disapproved Del Monte as a buyer and indicated that it would prefer to deal with Guatemalan nationals. In 1972, Del Monte successfully resumed its efforts to purchase the properties;

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[1] These criminal statutes—18 U.S.C. §§371, 1621, 1622, 1623, 1005, 1546 and 2071—are not predicate offenses within the meaning of RICO's definitions of "racketeering activity." *See* 18 U.S.C. §1961(1). As a result, they cannot form the bases of a RICO claim. *See United States* v. *Pepe*, 747 F.2d 632, 645 (11th Cir. 1984). Nor do purely criminal statutes provide a private right of action to a civil litigant such as plaintiff. *See, e.g., Dugar* v. *Coughlin*, 613 F. Supp. 849, 852 n. 1 (S.D.N.Y. 1985) (no private right of action under 18 U.S.C. §371); *Fiorino* v. *Turner*, 476 F. Supp. 962, 963 (D. Mass. 1979) (same); *Weiland* v. *Byrne*, 392 F. Supp. 21, 22 (N.D. Ill. 1975) (private litigant does not have standing under 18 U.S.C. §1621).

Guatemala approved Del Monte as a purchaser and the sale was confirmed by the Lousiana court. The divestiture occurred on December 14, 1972.

According to plaintiff, he and a Guatemalan, Julian Presa, had formed an enterprise, the Pan Tropic Fruit Company, to purchase the divestiture properties. Plaintiff appeared as *amicus curiae* at the hearing before the Louisiana court to oppose the sale of the properties to Del Monte. He has been challenging the results of the divestiture ever since.

In November 1974, plaintiff filed an action in Massachusetts state court against United Fruit and Eli M. Black, United's then chairman. Plaintiff alleged that United Fruit and Black had breached an oral contract to sell to him the divestiture properties. This suit was dismissed by the state court, as was plaintiff's appeal to the Massachusetts Appeals Court.

Shortly after the dismissal of his appeal in June, 1979, plaintiff commenced an action in this Court, Civil Action No. 79-1180-T. Plaintiff named as defendants Del Monte and United Brands; he alleged that they violated the federal antitrust laws by excluding companies other than Del Monte from purchasing United Brands' Guatemala properties, by undermining plaintiff's efforts to purchase the properties, by refusing to divulge information and divulging false information concerning the properties, by using bribery and political pressure to obtain Guatemalan approval of Del Monte as the purchaser, and by withholding information from the Louisiana federal court in 1972.

In March, 1983, United Brands and Del Monte moved for summary judgment. In July, 1983, after submission of briefs and oral argument, Magistrate DeGiacomo recommended that defendants' motions be granted. He found that plaintiff's action was time-barred, that plaintiff lacked standing under the Clayton Act, that the Act of State Doctrine barred plaintiff's action and that plaintiff's suit was an impermissible collateral attack on the consent decree and judgment of the

Louisiana federal court. The District Court approved the Magistrate's recommendation and granted defendants' motions for summary judgment in August, 1983.

Plaintiff appealed to the United States Court of Appeals for the First Circuit. On September 17, 1984, the First Circuit affirmed the District Court's grant of summary judgment on the ground that the action was time-barred. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984). Plaintiff petitioned the United States Supreme Court for *certiorari*. The petition was denied in March, 1985. 105 S.Ct. 1765 (1985). Plaintiff thereafter filed the instant action.

II. *DISCUSSION*

A. Summary Judgment Standard[2]

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.* v. *Catrett*, 106 S.Ct. 2548, 2555 (1986) (quoting Fed. R. Civ. P. 1). To survive defendants' motions for summary judgment, plaintiff must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P. 56(e); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S.Ct. 1348, 1355-56 (1986). As the Supreme Court recently has made clear, the standard for granting summary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). That is, the inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 2512. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue

[2] Because papers outside the pleadings have been considered, this court will treat the instant motions as motions for summary judgment. Fed. R. Civ. P. 12(b).

for trial.'" *Matsushita*, 106 S.Ct. at 1356 (citing *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968)).

In determining defendants' motion for summary judgment, this court must view the evidence and all inferences in the light most favorable to the party opposing the motion. *Hahn* v. *Sargent*, 523 F.2d 461, 464 (1st Cir. 1975) (citations omitted), *cert. denied*, 425 U.S. 904 (1976). However, plaintiff may not obtain a trial merely on the allegations in his complaint, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90 (1968), or by showing that there is "some metaphysical doubt as to the material facts," *Matsushita, supra*, 106 S.Ct. at 1356 (citations omitted). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 106 S.Ct. at 2510.

Plaintiff's complaint can be read to concern two distinct sets of events. First are his allegations that the 1972 method of divestiture and the incidents surrounding it violated RICO, other laws, and common law rights belonging to plaintiff. Second, plaintiff complains about the defendants' actions during the prior federal suit in this court. Because different legal standards apply to each of these claims, this court will address each separately.

B. *Claims Based on the 1972 Divestiture*

1. United Brands and Del Monte

United Brands and Del Monte, the two defendants in the prior federal action, claim that plaintiff's RICO claims against them are barred by the doctrine of *res judicata*, or claim preclusion. That conclusion is inescapable in the circumstances.

Under this doctrine, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."

Allen v. *McCurry*, 449 U.S. 90, 94 (1980). A grant of summary judgment is a judgment on the merits. *See Rose* v. *Town of Harwich*, 778 F.2d 77 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 2278 (1986); *Isaac* v. *Schwartz*, 706 F.2d 15, 17 (1st Cir. 1983) (dismissal for failure to state a claim under Rule 12(b)(6) is a judgment on the merits); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶0.409 [1.-2] (1984) (judgment on motion for summary judgment is on the merits).

The bar of res judicata, however, is limited to cases arising out of the same claim or cause of action. *Manego* v. *Orleans Board of Trade*, 773 F.2d 1, 5 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1466 (1986). This circuit has adopted the approach of §24 of the *Restatement (Second) of Judgments* in determining when two cases concern the same claim. *Id.*

> § 24. Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar. . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) Judgments §24 (1982).

Plaintiff cannot avoid res judicata by pleading different legal theories or by adding new defendants. *Manego*, 773 F.2d at 6; *Restatement*, §24, comm. c., §25, comm. d. As the comments to §24 point out:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.

§24, comm. c. Similarly, when a judgment is on statute of limitations grounds, as in plaintiff's prior suit, the bar is not avoided by shifting the legal theory on which the claim is pitched. *Moore's Federal Practice*, ¶0.409[6]. If the transaction underlying the two suits is the same, res judicata is a bar to the second suit.

There is no doubt that the underlying facts of the RICO claim are precisely the same as the facts underlying the antitrust claim. Plaintiff's first complaint concerned alleged violations of the antitrust laws based on the 1958 consent decree and 1972 divestiture of the Guatemalan banana properties. His second complaint involves the same occurrences, but alleges that the divestiture and those who took part in it violated RICO. This court has carefully reviewed plaintiff's pleadings in this case and is unable to find any factual allegations indicating that plaintiff's current action grows out of a different transaction than that alleged in his first suit.

Widening the alleged conspiracy to include government officials and law firms does not change this result; the fact is that the actions of the new defendants which are alleged to violate RICO are the same actions about which plaintiff has complained in the prior suit. Plaintiff adds little that is different in this action and any minor differences that he does allege do not transform his second suit into a new cause of action. *See Manego*, 773 F.2d at 6. Res judicata, then, bars all of plaintiff's claims which concern the 1972 divestiture.[3]

[3] Plaintiff argues that, because none of the defendants had been convicted under RICO, he could not have brought his RICO suit until 1985 when the

2. The Remaining Defendants

The remaining defendants, not parties to the prior suit, also argue that *res judicata* bars this present RICO action against them. Although there is some support for the position that strangers to the first action may claim the effects of *res judicata*,[4] that is not the law, except in limited circumstances, in this circuit.[5]

In *Manego* v. *Orleans Board of Trade*, the First Circuit Court of Appeals affirmed the trial court's decision that *res judicata* did not apply to a defendant which was not a party to the prior suit. 773 F.2d at 7, *affirming* 598 F. Supp. 231, 235 (D. Mass. 1984); *see also Valentin* v. *United States Postal Service*, 787 F.2d 748, 750 and n. 1 (1st Cir. 1986) (res judicata available only to "parties or their privies"); *Sierra Club* v. *Secretary of Transportation*, 779 F.2d 776, 779 (1st Cir. 1985)

United States Supreme Court resolved a conflict among the Circuit and district courts. *See Sedima, S.P.R.L.* v. *Imrex Co.*, 105 S.Ct. 3275 (1985) (holding that a RICO private treble damages action may be brought even though defendants have not been criminally convicted of a predicate act under RICO). Plaintiff seeks far too much from far too little. The mere fact that a conflict existed does not excuse a litigant from asserting all claims. The very existence of a conflict indicates that the claim was not frivolous, and plaintiff's choice not to pursue a RICO claim at that time is not a valid defense to the doctrine of *res judicata*.

[4] Permitting "nonmutual claim preclusion" would be attractive in this case which reflects "no more than a last desperate effort by a plaintiff who is pursuing a thin claim against defendants who were omitted from the first action because they were less directly involved than the original defendants." 18 C. Wright, W. Miller & E. Cooper, *Federal Practice and Procedure*, §4464, at 588-89 (1981). Professors Wright, Miller and Cooper suggest a limited rule that would permit nonmutual claim preclusion only when the new defendant can show why he should have been joined in the first suit and plaintiff cannot show any good reasons justifying a second chance. *Id.* at 589. This, however, is not the law of this circuit.

[5] Defendants seemingly argue that the fact that a claim may be the same for *res judicata* purposes even if new defendants are present in the second suit means that those new defendants may also claim the bar of *res judicata*. Section 24's test, however, is only aimed at determining when the same transactions underly two claims once the prerequisites to res judicata already apply, namely, identity of parties.

(basic prerequisites of res judicata are finality of judgment, *identity of parties* and identity of claim).

The First Circuit cases on which defendants rely exemplify the limited exceptions to the mutuality requirement and are not applicable in this case. For example, in *Capraro* v. *Tilcon Gammino, Inc.*, 751 F.2d 56 (1st Cir. 1985), the court held that the parent of a wholly-owned subsidiary could take advantage of *res judicata*, even though only its subsidiary was a defendant in the first suit. *Id.* at 59 (citing §59(3) of the *Restatement (Second) of Judgments*, which specifically concerns holders of ownership in corporations). The court held that under the requirements of §59(3), the subsidiary had acted at the direction of its parent. *Id.*

Another exception to the rule that there must be identity of parties appears in *Mashpee Tribe* v. *Watt*, 707 F.2d 23 (1st Cir.), *cert. denied*, 464 U.S. 1020 (1983). The claims in *Mashpee Tribe* concerned title to land. When property rights are at stake, new defendants may claim the bar of res judicata. *Id.* at 24-25 (citing *Restatement (Second) of Judgments* §§25, 43 comm. c.).

Notwithstanding these limitations, however, defendants may assert the benefits of collateral estoppel, or issue preclusion, on at least those claims of plaintiff involving the 1972 divestiture. *See Manego*, 598 F. Supp. at 236 (stranger to first action may defensively assert principles of issue preclusion) (citing *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979)). Collateral estoppel applies when an issue of fact or law is actually litigated and determined by a final judgment and the determination is essential to the judgment. *Restatement (Second) Judgments* §27; *Manego*, 598 F. Supp. at 236.

The Court of Appeals in *Berkson* v. *Del Monte Corp.* concluded that plaintiff's antitrust claim based on the 1972 divestiture arose no later than December, 1972, and that there was no fraudulent concealment of this claim. 743 F.2d at 55-57. Despite plaintiff's arguments to the contrary, there is

no doubt that he had a full and fair opportunity to litigate these issues; when issues are submitted and determined on motions for summary judgment such issues have been "actually litigated." *Restatement*, §27, comm. d. Also, the factual determinations regarding the bar of the statute of limitations were necessary to the judgment of the Court of Appeals in the prior suit as they were the bases for the affirmance of the district court's grant of summary judgment. *See Berkson* v. *Del Monte Corp.*, 743 F.2d at 57.

Plaintiff's prior suit was based on antitrust law. The instant suit is premised on alleged RICO violations. However, the change in legal theory cannot disguise the fact that plaintiff's two causes of action are grounded on the same transaction—the 1972 divestiture. Plaintiff alleges no new facts regarding the events surrounding the sale of United Brands' Guatemalan banana properties. Thus, the issue of when the antitrust claim arose is identical to the issue of when the RICO claim arose. Both arose by December, 1972. *Cf. Wilson* v. *Retail Credit Co.*, 474 F.2d 1260, 1261 & n. 2 (5th Cir. 1973) (finding that statute of limitations barred plaintiff's libel claim is entitled to collateral estoppel where same facts underly plaintiff's new cause of action based on different legal theory).

That plaintiff's RICO claim is time-barred is obvious.[6] Plaintiff attempts to avoid the statute of limitations, as he did in the prior suit, by alleging fraudulent concealment. He asserts that it was only during the discovery process of the prior suit that he learned of the facts on which his RICO claims are premised. Complaint ¶16. Without specifying what these facts are, he broadly alleges that after commencing his action, he discovered that the government agencies involved in the divestiture were not "faithfully executing the laws of the United States." *Id.*

However, the Court of Appeals found that Berkson did not use due diligence in discovering the facts underlying his anti-

[6] This is so no matter what statute of limitations applies. *See infra.*

trust cause of action and, thus, that he did not meet the requirements to invoke the doctrine of fraudulent concealment. 734 F.2d at 56-57. Because the *facts* on which both claims are premised are identical, the finding of lack of due diligence precludes plaintiff from relitigating whether any of these new defendants fraudulently concealed his RICO claim.

Plaintiff already has had his one bite at the apple to litigate the statute of limitations issues; he is not entitled to yet another. As the United States Supreme Court has made clear:

> Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 185 (1952).

Blonder-Tongue Laboratories, Inc. v. *University of Illionois Foundation*, 402 U.S. 313, 329 (1971). Moreover, collateral estoppel acts to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). This case readily invites—indeed, demands—application of these principles. All of plaintiff's claims based on the 1972 divestiture are time-barred as to these new defendants as well.

C. *Claims Based on Events in the Prior Federal Action*

In his complaint, plaintiff charges that some defendants acted improperly in the prior federal action. Specifically, plaintiff claims that Palmer & Dodge and Goodwin, Procter & Hoar (attorneys for Del Monte and United Brands respectively) misled the court about the facts, "blinded" the court, aided the court in "expunging" a document from court records, influenced the decision of Magistrate DeGiacomo and

wrote the Magistrate's decision for him.[7] Plaintiff additionally charges Palmer & Dodge with refusing to correct, in open court, an incorrect answer to an interrogatory,[8] and with filing false affidavits. Similarly, plaintiff asserts that Del Monte filed false affidavits.

To the extent that these claims are alleged to violate RICO, they are barred by the applicable statute of limitations.

Because RICO contains no limitations period, this court must apply the most analogous state statute of limitations. *Wilson* v. *Garcia*, 471 U.S. 261 (1985). Under the test announced in *Garcia*, courts first must decide whether all causes of action under a particular federal statute should be characterized in the same way for limitations purposes, or whether individual determinations should be made based upon the underlying fact patterns in each case. *Id.* at 271-75. Courts that have addressed this issue in the context of RICO have reached opposite conclusions. *Compare Malley-Duff & Associates, Inc.* v. *Crown Life Insurance Co.*, 792 F.2d 341, 349, 352-53 (3d Cir. 1986) (court must choose *one* analogous state statute of limitations for all RICO claims; court chose state's catchall limitations statute for claims based on statute), *cert. granted*, 107 S.Ct. 569 (1987), with *Silverberg* v. *Thomson McKinnon Securities, Inc.*, 787 F.2d 1079, 1083 (6th Cir. 1986) (court must look to characterization of underlying facts in particular cases to determine analogous state statute of limitations; court chose limitations period for common law fraud).

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[7] It is not insignificant, of course, that the judgment in the prior litigation was entered by the district judge—not the magistrate—and affirmed by the United States Court of Appeals.

Plaintiff also asserts that Pillsbury, Madison & Sutro and Covington & Burling misled the court in the prior action. As there is no evidence that these two law firms were involved in the prior federal suit, it is difficult to see to what plaintiff is referring. To the extent plaintiff is complaining about actions that took place before the Louisiana federal district court in the early 1970s, his claim clearly is time-barred. *See* Part IIB, *supra*.

[8] In the answer, Del Monte gave the name of a bank incorrectly. The proper name was City National Bank; the answer to the interrogatory identified the bank as the First National Bank of Miami.

Because Massachusetts does not have a limitations period specifically applicable to statutory causes of action, the most analogous statute of limitations under either prong of the test, is the three year limitations period contained in M.G.L. c. 260, §2A.[9] Thus, plaintiff's cause of action is barred if it accrued prior to September 25, 1983.

The actions about which plaintiff complains specifically concern the issuance of Magistrate DeGiacomo's Report and Recommendation in July 1983. At the latest, plaintiff should have been aware of his cause of action by August 1983, when the district judge approved the magistrate's report, and entered judgment thereon, and plaintiff offers nothing to indicate that he was not, or was prevented from being, so aware.

Based on the foregoing, then, plaintiff's RICO claims based on defendants' alleged actions in the prior suit are likewise barred by the statute of limitations.

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[9] M.G.L. c. 260, §2A provides:

> §2A. Three years; actions of tort, contract to recover for personal injuries and replevin
>
> Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

Although no court within the First Circuit has appeared to have decided this precise question, the court in *UST Capital Corp.* v. *Charter Nat'l Life Insurance Co.*, No. 77-21-Z, slip. op. (D.Mass. 1986), agreed with the parties that §2A governed in a RICO action based on fraud. Here, also, plaintiff's allegations concerning the defendant's actions in the prior suit most resemble claims that the defendants perpetrated a fraud upon the court.

III. *CONCLUSION*

For the reasons set forth above, this Court accordingly recommends[10] that defendants' various motions for summary judgment be allowed, and that judgment accordingly enter for the defendants.

s/ LAWRENCE P. COHEN
United States Magistrate

[10] The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the Distrtict of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See *United States* v. *Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F 2d 603 (1st Cir. 1980); *United States* v. *Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott* v. *Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); see also, *Thomas* v. *Arn*, __ U.S. __, 106 S.Ct. 466 (1985).

AO 450 (Rev.5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASE NUMBER CA 86-2775-N

HERBERT D. BERKSON

v.

DEL MONTE CORPORATION, ET AL.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** The Court having accepted the recommendation of Magistrate Cohen, and having adopted same,

IT IS ORDERED AND ADJUDGED

JUDGEMENT FOR DEFENDANTS.

May 29, 1987 GEORGE F. MCGRATH, *Clerk*

(By) /s/ (ILLEGIBLE), *Deputy Clerk*

[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 87-1539

HERBERT D. BERKSON,

PLAINTIFF, APPELLANT,

v.

DEL MONTE CORPORATION, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID S. NELSON, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
COFFIN AND SELYA, *Circuit Judges*.

Herbert D. Berkson on brief pro se.

Craig E. Stewart, *John T. Harding, Jr.* and *Palmer & Dodge* on brief for appellees, Palmer & Dodge and Pillsbury, Madison & Sutro.

Thomas J. Griffin, Jr. and *Goodwin, Procter & Hoar* on brief for appellee Goodwin, Procter & Hoar.

Thomas J. Griffin, Jr., *Richard A. Oetheimer*, *Gordon H. Piper* and *Goodwin, Procter & Hoar* on brief for appellee United Brands Company.

Christine M. Roach, Assistant U.S. Attorney and *Frank L. McNamara, Jr.*, Acting United States Attorney, on brief for appellees Henry A. Kissinger, William P. Rogers and Nathaniel Davis.

Jennifer A. Kemp, *Jeffrey B. Rudman* and *Hale and Dorr* on brief for appellee Price Waterhouse.

Jack R. Pirozzolo, *Richard L. Binder*, *Willcox, Pirozzolo & McCarthy, Professional Corporation* on brief for appellee Covington & Burling.

Paul B. Galvani and *Ropes & Gray* on brief for appellee Del Monte Corporation.

June 29, 1988

PER CURIAM. The judgment of the district court is affirmed substantially for the reasons stated in the magistrate's report and recommendation adopted by the district court.

The magistrate found that plaintiff Herbert Berkson's claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, against all defendants were time-barred (whereas principles of res judicata were found to preclude Berkson's claims only against those defendants who were parties to plaintiff's prior federal suit, *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985)).

In so finding, the magistrate applied the three-year limitations period for Massachusetts tort actions contained in Mass. Gen. Laws c. 260, § 2A, as the statute of limitations governing plaintiff's RICO claims. Plaintiff's complaint having been filed on September 25, 1986, the magistrate found that plaintiff's claims were barred if they accrued before September 25, 1983. Accordingly, plaintiff's claims based on defendants' alleged misdeeds in the course of plaintiff's prior federal action were held time-barred because all these claims accrued by August 1983, when the district court entered judgment against plaintiff on the basis of the magistrate's report and recommendation. Plaintiff's other claims based on the 1972 divestiture of United Brands were held time-barred because they arose no later than 1972 and because principles of collateral estoppel bound plaintiff to the determination in the prior federal action that there had been no fraudulent concealment of these claims.

After the district court's judgment the Supreme Court ruled in *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759 (1987), that the four-year statute of limitations governing Clayton Act civil enforcement actions, 15 U.S.C. § 15b, constituted the applicable limitations period for civil

RICO actions. Thus, plaintiff's claims are time-barred if they accrued before September 25, 1982, not the September 25, 1983 date applied by the magistrate.

Obviously, this adjustment does not affect plaintiff's claims based on the 1972 divestiture. Those claims remain long time-barred under the new standard.

Nor does application of the four-year limitations period revive, as timely, any of plaintiff's RICO claims based on events in the prior federal action. A cause of action under RICO accrues when "a plaintiff knows or should know of the injury" which forms the basis of the plaintiff's action. *Bowling* v. *Founders Tile Co.*, 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986). Plaintiff's RICO claims against each defendant accrued when he was first injured by that defendant's alleged acts, not when the last predicate act for a RICO claim occurred. *Id.* The allegedly false affidavit of Laurence Johnson submitted by Palmer and Dodge on Del Monte's behalf was filed on or about August 1, 1979, and the allegedly false interrogatories filed by Palmer and Dodge on Del Monte's behalf were filed on June 18, 1981. Furthermore, plaintiff asserts in his brief on appeal that by November 25, 1981 he noticed that the district judge in the prior federal action had turned against him as part of a conspiracy involving Palmer and Dodge, Goodwin, Procter, and Hoar,[1] and their clients. Accordingly, we hold that plaintiff's claims under RICO accrued before September 25, 1982 and are therefore time-barred even under *Agency Holding Corp.*, *supra*, 107 S. Ct. 2759.

Plaintiff also purported to bring claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e). Claims brought under that section, which does not itself specifically provide for a limitations period, are subject to the most closely analogous statute of limitations of the forum state, i.e., the statute of limitations for common law fraud actions. *Stull* v. *Bayard*, 561 F.2d 429, 431 (2d Cir. 1977), *cert. denied*, 434

U.S. 1035 (1978). *See Cook* v. *Avien, Inc.*, 573 F.2d 685, 694 (1st Cir. 1978); *Janigan* v. *Taylor*, 344 F.2d 781, 783 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). In Massachusetts the limitations period for tort and fraud actions is three years. Mass. Gen. Laws c. 260, § 2A. Accordingly, any securities claim plaintiff might assert is barred if it accrued before September 25, 1983. However, plaintiff's securities claims are based on his allegation that defendant Price Waterhouse wrongfully approved defendant Del Monte Corp.'s 1972 payment of $500,000—characterized by plaintiff as a bribe—to a foreign consultant in connection with the 1972 divestiture. Not only did this payment occur fourteen years before plaintiff filed his complaint, but plaintiff's complaint concedes that the "bribe" was reported in a 1975 article in the *Wall Street Journal*. Plaintiff's securities claims under 15 U.S.C. § 78n are, accordingly, time-barred.

Insofar as plaintiff purports to bring a variety of common law tort claims (governed by the three-year statute of limitations of Mass. Gen. Laws c. 260, § 2A) and claims under the Sherman and Clayton Acts (governed by the four-year statute of limitations of 15 U.S.C. § 15b), these claims are time-barred and/or precluded under principles of res judicata for the reasons stated in the magistrate's report and recommendation and in this opinion.

Defendant-appellee Covington & Burling's request for sanctions against plaintiff is denied.

The judgment of the district court is *affirmed*.

United States Court of Appeals
For the First Circuit

No. 83-1636

HERBERT D. BERKSON,
PLAINTIFF, APPELLANT,

v.

DEL MONTE CORPORATION, ET AL.,
DEFENDANTS, APPELLEES.

Before CAMPBELL, *Chief Judge*, BOWNES, *Circuit Judge*, and PEREZ-GIMENEZ,* *District Judge*.

J. Sheffield Dow, Boston, Mass., for plaintiff, appellant.

Thomas J. Griffin, Jr., Boston, Mass., with whom *Richard A. Oetheimer*, *Gordon H. Piper*, and *Goodwin, Procter & Hoar*, Boston, Mass., were on brief, for defendant, appellee United Brands Co.

Craig E. Stewart, Boston, Mass., with whom *Erik D. Lazar*, *John T. Harding, Jr.*, and *Palmer & Dodge*, Boston, Mass., were on brief, for defendant, appellee Del Monte Corp.

ARGUED AUGUST 6, 1984.
DECIDED SEPT. 17, 1984.

BOWNES, *Circuit Judge*. Appellant Herbert Berkson brought this action under 15 U.S.C. §§1 and 2, alleging that appellees Del Monte and United Brands conspired together to prevent Berkson and his Pan Tropic Fruit Company from purchasing certain banana properties in Guatemala. The district court granted summary judgment on the ground, among others, that the action was time barred. We find this issue dispositive, and affirm.

* Of the District of Puerto Rico, sitting by designation.

Under a consent decree in *United States* v. *United Fruit Co.*, Civil No. 4560 (E.D. La. 1958), United Brands' predecessor, United Fruit, agreed to divest itself of some Central American banana properties. After an unsuccessful attempt to fulfill the decree by selling properties in Panama, United Fruit turned to the Guatemalan properties involved in this case. Bids were solicited; among the bidders were Del Monte and Pan Tropic. In the hope that a suitable mixed Guatemalan-American enterprise could be found, the Guatemalan Government initially refused to approve Del Monte as a potential purchaser in November, 1971. In October, 1972, however, the Guatemalan Government changed its position and approved the sale to Del Monte. The United States Department of Justice also approved. After a hearing before the United States District Court for the Eastern District of Louisiana at which Berkson appeared as *amicus curiae* opposing the transaction, the sale to Del Monte was consummated in December, 1972. In June, 1979, six and one-half years later, Berkson filed the complaint in this case.

In his complaint, Berkson charged Del Monte and United Brands with the following antitrust violations: conspiring to exclude companies other than Del Monte from purchasing the Guatemalan properties; refusing to divulge information, and divulging false information, to prospective purchasers other than Del Monte concerning the properties; undermining Berkson's sources of financial backing; using political pressure, intimidation, and bribery to drive away Berkson's Guatemalan associate and obtain approval of the sale to Del Monte from the Guatemalan Government; withholding information from the federal district court at the 1972 hearings; and maintaining a shared monopoly by excluding competitors from the banana growing and importing market. Although Berkson claims that the alleged violations have continuing effects in the United States, his complaint is based entirely on actions occurring before the consummation of the 1972 sale;

no subsequent overt act in furtherance of the alleged conspiracy is described or even hinted at. It is clear, therefore, that Berkson's cause of action accrued no later than December, 1972,[1] for the impact of events leading up to the sale became final at that time and any subsequent harm must be seen as the "unabated inertial consequence[ ]" of the earlier events. *See In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71-72 (9th Cir.), *cert. denied*, 444 U.S. 900, 100 S.Ct. 210, 62 L.Ed.2d 136 (1979); *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117, 126-28 (5th Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2166, 48 L.Ed.2d 793 (1976).

On its face, the action is barred by the four-year statute of limitation. 15 U.S.C. § 15b. Berkson seeks to avoid the time bar on the only legal theory available to him, namely, by ascribing his failure to bring timely suit to fraudulent concealment on the part of Del Monte and United Brands. He argues that in 1972 he lacked the requisite factual basis for filing an antitrust complaint though his suspicions were already aroused, and that he only became aware of appellee's specific misconduct in July, 1975, through a *Wall Street Journal* article. To invoke the doctrine of fraudulent concealment, a plaintiff must plead and prove three elements: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975); *see also In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980); *Charlotte Telecasters*,

[1] The rule that a limitation period is tolled when damages are speculative or unascertainable, *see Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 339, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971), has no application here.

Inc. v. *Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976). The burden rests squarely on the party pleading fraudulent concealment. *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed.2d 270 (1974).

In reviewing Berkson's voluminous submissions in opposition to the summary judgment motion,[2] we find no trace of any allegation, let alone a showing sufficient to raise a genuine issue of fact, concerning the first and third elements of fraudulent concealment. It is well established that

> the plaintiff must allege facts showing affirmative conduct on the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief. Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure. The affirmative act of denying wrongdoing may constitute fraudulent concealment where the circumstances make the plaintiff's reliance upon the denial reasonable. . . .

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[2] In his opposition to the summary judgment motion and his accompanying affidavit, Berkson stated merely that he believed neither appellee was entitled to summary judgment; he failed to specify a single issue of material fact relevant to the statute of limitation issue. His attempt to incorporate by reference over 5,000 pages of pleadings, depositions, and discovery documents was blatantly improper under Fed. R. Civ. P. 56(e), which requires that affidavits be made on personal knowledge and set forth specific facts admissible in evidence to show that there is a genuine issue for trial. The district court would have been fully justified in disregarding Berkson's submissions for lack of authentication and failure to identify or organize relevant documents in a "reasonably intelligible manner." *See Zoslaw* v. *MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085, 103 S.Ct. 1777, 76 L.Ed.2d 349 (1983). We have nevertheless reviewed Berkson's own deposition testimony and other submissions, and have found nothing in them sufficient to raise an issue of fact as to fraudulent concealment.

Rutledge v. *Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). Although fraud in the sale of the banana properties underlies Berkson's complaint, there is no charge of affirmative conduct by the appellees intended to conceal the facts upon which Berkson based his complaint or to deceive him into believing that he did not have a cause of action. At most, Berkson has alleged that appellees have refused to divulge information to substantiate his earlier suspicions. *See Hall* v. *E. I. DuPont de Nemours & Co.*, 312 F.Supp. 358, 362 (E.D.N.Y. 1970) (conspiracy secret by nature, not per se sufficient to toll statute of limitation). Indeed, we note that Berkson voiced his suspicions and filed an *amicus curiae* brief before the United States District Court for the Eastern District of Louisiana in 1972, when he opposed the sale to Del Monte on grounds virtually identical to those advanced in the present case. In the absence of a fiduciary relationship between Berkson and appellees, we do not think that silence or refusal to cooperate on the part of Del Monte and United Brands rises to the level of fraudulent conduct.

Appellees argue that Berkson's appearance and submissions in Louisiana in 1972 establish as a matter of law that he had actual notice at that time of his cause of action, and that he cannot meet the second limb of the test for fraudulent concealment. Had the district court considered the claim on the merits, we would likely agree; on a motion for summary judgment, though, we hesitate to infer that Berkson knew of facts sufficient to support a claim in 1972. Nevertheless, we need not reach the question of how concrete or well founded a suspicion of misconduct must be to constitute notice of "the facts necessary to institute [a] suit," for even if Berkson's suspicions were purely conjectural in 1972 and became concrete only later, a "plea of ignorance" standing alone "is insufficient to avoid the statute [of limitation]." *Charlotte Telecasters*, 546 F.2d at 574; *Akron Presform*, 496 F.2d at 234.

If Berkson wished to bring an action based on his suspicions, he was under a duty to exercise due diligence in investigating whether the suspicions were well founded. There is absolutely no indication in the record, however, of any particular attempt on Berkson's part to engage in discovery or make a "conscientious effort" to substantiate the suspicions he voiced to the district court in Louisiana in 1972. *See General Aircraft Corp.* v. *Air America, Inc.*, 482 F.Supp. 3, 8-9 (D.D.C. 1979). Conclusory allegations are not sufficient, *see Dayco*, 523 F.2d at 394; *Akron Presform*, 496 F.2d at 234; where a plaintiff has utterly failed to make even the requisite allegations, he cannot claim that his underlying cause of action was fraudulently concealed.

In the absence of a valid defense to the statute of limitation, the district court was correct in granting summary judgment for appellees on the ground that the action was time barred.

Affirmed. Costs awarded to appellees.